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No. 238

In the Supreme Court of the United States

OCTOBER TERM, 1960

H. A. LOTT, LEE BLOCKER AND LORN D. FRAZIER,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (R. 107–116) is reported at 280 F. 2d 24.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 1960 (R. 117). The petition for a writ of certiorari was filed on July 15, 1960, and granted on October 10, 1960 (364 U.S. 813; R. 119). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the time prescribed by Rule 37(a)(2) of the Federal Rules of Criminal Procedure for noting appeals in criminal cases can be enlarged by the filing of an untimely motion in arrest of judgment.

2. Whether petitioners' motions in arrest of judgment may be treated, in the circumstances of this case, as valid motions under Rule 12(b) or 28 U.S.C. 2255.

3. Whether the indictment charges petitioners with the offense of having wilfully attempted to evade the corporate tax and with conspiracy to commit the substantive offenses.

4. Whether the trial court convicted and sentenced petitioners not upon their pleas of *nolo contendere* but upon evidence adduced at the trial of their co-defendants.

5. Whether the characterization of petitioners' offenses in the formal judgments entered by the trial court, correctible, if erroneous, under Rule 36 of the Federal Rules of Criminal Procedure, transmuted the felonies charged in the indictment into misdemeanors.

STATUTES AND RULES INVOLVED

The Internal Revenue Code of 1939, Section 145(b); Internal Revenue Code of 1954, Section 7201; 18 U.S.C. 371; 28 U.S.C. 2255; Federal Rules of Criminal Procedure, Rules 12(b)(2), 32(a), 32(d), 33, 34, 36, 37(a)(2), and 45(b); Criminal Appeals Rules of 1933, Rules I, II(2), and III are set out in the Appendix, *infra*, pp. 43–50.

STATEMENT

Petitioners (together with two other individuals not involved in this proceeding) were indicted in the United States District Court for the Southern District of Texas for having wilfully attempted to evade the taxes of Farnsworth and Chambers Company, Inc., for the years 1951 through 1954 (counts one through four), and for conspiracy to commit the substantive offenses (count five) (R. 1–10). The substantive counts alleged, *inter alia,* the following amounts of reported and corrected corporate net income and tax liability (R. 1–6):

Net income

Year	Reported	Corrected	Additional
1951	$399, 135. 98	$763, 599. 62	$364, 463. 64
1952	410, 937. 87	495, 528. 77	84, 590. 90
1953	179, 628. 93	362, 929. 90	183, 300. 97
1954	282, 441. 03	406, 898. 80	124, 457. 77
	$1, 272, 143. 81	$2, 028, 957. 09	$756, 813. 28

Tax liability

Year	Reported	Corrected	Additional
1951	$194, 482. 66	$482, 278. 96	$287, 796. 30
1952	207, 135. 40	251, 122. 66	43, 987. 26
1953	87, 907. 04	183, 223. 55	95, 316. 51
1954	135, 797. 53	200, 515. 57	64, 718. 04
	$625, 322. 63	$1, 117, 140. 74	$491, 818. 11

Petitioners entered *nolo contendere* pleas on March 17 and 20, 1959. The court accepted the pleas and ordered pre-sentence investigation (R. 16–41).

Thereafter, the two remaining co-defendants were tried; one was acquitted and the jury could not agree as to the other (Pet. Br. 5). On June 19, 1959, the court heard petitioners' pleas in mitigation (R. 42–59) and imposed the following sentences: upon petitioner Blocker, concurrent three-year prison terms; upon petitioners Frazier and Lott, concurrent two-year prison terms; and upon each petitioner, fines totaling $20,000 (R. 60–61). The court filed formal written judgments on June 22, 1959 (R. 61–66). Petitioners filed motions in arrest of judgment on June 23, 1959, which were denied on July 13, 1959 (R. 66–72). Notices of appeal were filed by petitioner Lott on July 15, 1959, and by petitioners Blocker and Frazier on July 17, 1959 (R. 74, 80–82). The court of appeals (one judge dissenting, without opinion) dismissed the appeals as untimely (R. 107–116).

SUMMARY OF ARGUMENT

I

The court of appeals had no jurisdiction over this case since the appeal was not timely.

A. Concededly, petitioners did not appeal within ten days after entry of the sentence and judgment, as required by Rule 37(a)(2) of the Federal Rules of Criminal Procedure. They contend, however, that, because they filed motions in arrest of judgment, their time for taking an appeal was tolled to the end of the ten-day period following the denial of the motions, as Rule 37(a)(2) also provides. But the motions in arrest of judgment were themselves untimely since

Rule 34 provides that a motion in arrest of judgment must be made within five days after "determination of guilt." Petitioners' guilt was determined when the district court accepted petitioners' *nolo contendere* pleas (*Hudson* v. *United States*, 272 U.S. 451, 455; *United States* v. *Norris*, 281 U.S. 619, 623), some three months before the motions in arrest of judgment were filed. Since the motions in arrest were untimely, they cannot serve to toll the ten-day period after judgment for filing notices of appeal.

Petitioners contend that the appeal provisions of Rule 37(a)(2) do not require reference to the time limitations of Rule 34, and that therefore even an untimely motion in arrest of judgment tolls the ten-day period in Rule 37(a)(2). If accepted, this position would render the five-day limit of Rule 34 (as well as the five-day period "after verdict or finding of guilty" provided in Rule 33 for motions for a new trial) without any meaning. For motions in arrest of judgment would not have to be made within five days after conviction, but could be made within ten days after sentence and judgment. Thus, by petitioners' contention, the time for filing both motions in arrest of judgment and notices of appeal is enlarged, in direct contradiction of Rule 45(b) which forbids the enlargement of these periods. In contrast, the government's position gives full effect to both Rules 34 and 37(a).

B. 1. The court of appeals had no jurisdiction even if petitioners' motions in arrest of judgment are considered as motions under Rule 12(b) or 28 U.S.C. 2255. Rule 12(b) allows motions (after the pre-trial

stage of the case) attacking the jurisdiction of the court or alleging the failure of the indictment to charge an offense "during the pendency of the proceeding." The Rule was promulgated under a statute authorizing this Court to prescribe "rules of pleading, practice, and procedure with respect to any or all proceedings prior to and including verdict, or finding of guilty or not guilty, * * * or plea of guilty." Thus, the phrase "pendency of the proceeding" can refer only to the period up to the time of verdict, and not thereafter. Here petitioners' motions were made not just after verdict, *i.e.*, when their pleas were accepted by the court, but even after sentence and judgment. Moreover, if Rule 12(b) (which has virtually the same language as Rule 34) allowed motions at any time after conviction, Rule 34—providing for motions in arrest of judgment only during the five-day period after conviction—would become almost entirely superfluous.

If petitioners' motions can be considered as valid under Rule 12(b), the only issue before the Court is petitioners' attack on the indictment. This is the only issue raised by petitioners here which comes even arguably within the scope of Rule 12(b). Rule 37 tolls the ten-day period for filing notices of appeal on the case as a whole only for valid motions under Rules 33 and 34, not for motions under Rule 12(b). As to the latter, an appeal taken within ten days of the denial of the motion would save only those issues cognizable under Rule 12(b).

2. Petitioners' motions cannot be considered as valid under 28 U.S.C. 2255. Both by the terms of the statute and by the ruling of this Court (*Heflin* v.

United States, 358 U.S. 415), 28 U.S.C. 2255 is available only for a person who is "in custody." Here, petitioners were not in custody at the time they made their motions or at any subsequent time.

II

If the court of appeals had jurisdiction, petitioners' contentions are nevertheless without substance on their merits.

A. The indictment and the bill of particulars voluntarily furnished by the government sufficiently apprised petitioners of the nature of the charges against them. The first four counts of the indictment (charging wilfully attempted evasion of corporate taxes) follow the language of the evasion statutes, which is all that is required, and also set forth, in considerable detail, the various means by which the attempted evasion was effected. The conspiracy count follows the language of 18 U.S.C. 371 and describes the acts implementing the conspiracy. In short, the indictment charged all the essential elements of the offense, leaving only specific details to be proved by evidence introduced at the trial.

B. The record clearly shows that petitioners were convicted and sentenced on their pleas of *nolo contendere*, as the judgments themselves explicitly stated, and not upon the evidence adduced at the trial of their co-defendants. The only references by the court to the latter trial were in response to statements made by petitioners' counsel during the sentencing proceeding. Moreover, petitioners made no motion to withdraw their pleas before sentence was imposed; they cannot, having relied on the advantages of *nolo*

contendere pleas, seek to withdraw them once they found that their sentences were more than they expected.

C. The written judgments describe petitioners' offenses as "filing false and fraudulent corporate income tax returns" and "conspiring to file false and fraudulent corporate income tax returns"—which are misdemeanor offenses. However, the written judgments do not directly mention misdemeanor sections of the Code but instead specifically state that petitioners violated Sections 145(b) of the 1939 Code and Section 7201 of the 1954 Code, both felony provisions. Moreover, the indictment explicitly charged felonies, petitioners pleaded *nolo contendere* to felonies, the district court orally found them guilty of felonies, and the sentences imposed were appropriate only for felonies.

In these circumstances, it is clear that petitioners were convicted and sentenced for felonies. The oral, not the written, sentence is conclusive; only if the oral sentence is ambiguous can other evidence, such as the written judgment, be used to ascertain the intent of the court. While here the oral sentences were unambiguous, even if other evidence could be relied on to ascertain the court's intent, this evidence establishes beyond doubt that petitioners were convicted and sentenced for felonies. If petitioners wish to correct what is obviously a clerical error in the written judgments, their proper remedy is a motion under Rule 36, which provides the means for correcting such errors.

ARGUMENT

I

THE COURT OF APPEALS LACKED JURISDICTION BECAUSE NO TIMELY APPEAL WAS TAKEN

A. PETITIONERS' MOTIONS IN ARREST OF JUDGMENT HAD NO TOLLING EFFECT UNDER RULE 37(a)(2) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE SINCE THEY WERE NOT FILED WITHIN FIVE DAYS AFTER DETERMINATION OF GUILT, AS REQUIRED BY RULE 34. THEREFORE, THEIR NOTICES OF APPEAL WERE UNTIMELY

Petitioners' *nolo contendere* pleas were tendered and accepted on March 17, 1959 (as to petitioners Blocker and Frazier (R. 16–29)) and on March 20, 1959 (as to petitioner Lott (R. 29–41)). The district court sentenced petitioners on June 19, 1959 (after the conclusion of the trial of two co-defendants which ended in acquittal for one and a hung jury as to the other). Formal judgments of conviction were entered against petitioners on June 22, 1959 (R. 61–66). Motions in arrest of judgment were thereafter filed on June 23, 1959 (R. 66–70) and were denied on July 13, 1959 (R. 72). Notices of appeal were filed by petitioner Lott on July 15, 1959 (R. 74–75) and by petitioners Blocker and Frazier on July 17, 1959 (R. 80–82). The question is whether these notices of appeal were timely filed. If the notices were not timely filed, then it is well settled that the court of appeals, and consequently this Court, are without power to consider the merits of petitioners' appeal. *United States* v. *Robinson*, 361 U.S. 220.

Rule 37(a)(2) [1] (Appendix, *infra*, pp. 47–48) provides, in part, that "[a]n appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from * * *." Petitioners admittedly (Pet. Br. 12) did not appeal within ten days after entry of the judgments, *i.e.*, imposition of sentence (*Berman* v. *United States*, 302 U.S. 211, 212). Rule 37(a)(2) provides additionally, however, that "if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion." Petitioners did file motions in arrest of judgment within 10 days after their sentences and formal judgments of conviction. But the tolling provision of Rule 37(a)(2) is nevertheless inapplicable because petitioners' motions were filed out of time and were themselves invalid. Accordingly, the notices of appeal had no operative effect.

1. *Petitioners' motions in arrest of judgment were untimely.*—Rule 34 (Appendix, *infra*, p. 47), providing for the arrest of judgment if an indictment "does not charge an offense or if the court was without jurisdiction of the offense charged," requires that "[t]he motion in arrest of judgment shall be made within 5 days after determination of guilt or within such further time as the court may fix during the 5-day period." Here, the proffer and acceptance of the *nolo contendere* pleas on March 17 and

[1] All references to Rules are to the Federal Rules of Criminal Procedure, unless otherwise stated.

March 20, 1959—some three months before the motions in arrest of judgment were filed—constituted the "determination of guilt" within the meaning of Rule 34. It is well settled that a jury verdict (*Drown* v. *United States*, 198 F. 2d 999, 1007 (C.A. 9), certiorari denied, 344 U.S. 920; *Finn* v. *United States*, 256 F. 2d 304 (C.A. 4)) or acceptance of a guilty plea (*Marteney* v. *United States*, 216 F. 2d 760, 762 (C.A. 10); *United States* v. *Bradford*, 194 F. 2d 197, 201 (C.A. 2)) is a "determination of guilt" for purposes of Rule 34. A *nolo contendere* plea is tantamount to a plea of guilty for the purposes of the particular case in which the plea is entered. *Hudson* v. *United States*, 272 U.S. 451, 455.[2] As this Court stated in *United States* v. *Norris*, 281 U.S. 619, 623:

> After the plea [of *nolo contendere*], nothing is left but to render judgment, for the obvious reason that in the face of the plea no issue of fact exists, and none can be made while the plea remains of record. * * * [T]he plea of *nolo contendere*, upon [the question of guilt or innocence] was as conclusive as a plea of guilty would have been. * * *
>
> The court [is] no longer concerned with the question of guilt, but only with the character and extent of the punishment.

---

[2] The Rules also acknowledge the similarity. Rule 32(d) (Appendix, *infra*, pp. 46–47) for example, provides: "*Withdrawal of Plea of Guilty.* A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea." The plea of *nolo contendere* is thus included under the heading, "Plea of Guilty."

Thus, the trial court here, after accepting the *nolo contendere* pleas—which it noted are "equivalent to a plea of guilty" (R. 42)—was solely concerned with the pre-sentence investigation preceding entry of final judgments at the conclusion of the entire case (R. 28–29).

Petitioners' contention that "determination of guilt" for the purposes of Rule 34 occurs upon "entry of judgment" is without substance. While time for appeal in Rule 37(a)(2) is measured from "entry of the judgment," the time for filing a motion in arrest of judgment specifically runs from "determination of guilt" under Rule 34. *United States* v. *Norris, supra,* and Rule 32[3] specifically recognize that determination of guilt and entry of judgment are disparate. Petitioners, in effect, would have this Court rewrite Rule 34 to substitute "entry of judgment" for "determination of guilt" (see Pet. Br. 18–19, 20). But if the framers of the Rules had intended such a result, they would have said so. Instead, the Notes of the Advisory Committee state that Rule 34 "continues existing law except that it enlarges the time for making motions in arrest of judgment from 3 days to 5 days. See Rule II(2) of Criminal Appeals Rules of 1933, 292 U.S. 661 * * *" (see Appendix, *infra,* p. 49). It follows that "determination of guilt" in Rule 34 has the same meaning as "verdict or finding of guilt" in Rule II(2) of the Criminal Appeals Rules of 1933. See also Orfield, *Arrest of Judgment*

[3] Rule 32(b) provides: "*Judgment.* A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. * * *"

in Federal Criminal Procedure, 42 Iowa Law Review 8, 10, 24.

This Court admonished in *United States* v. *Robinson, supra*, 361 U.S. at 229, that any revision of the Rules tending to enlarge the time for taking an appeal should be effected "through the rule-making process and not by judicial decision." The Court in *Robinson* relied on Rule 45(b) (Appendix, *infra*, p. 48) which explicitly provides that a district court has no power to "enlarge the period for taking any action under Rules 33 [and] 34 * * * or the period for taking an appeal." Thus, the district court had no power to hear petitioners' untimely motions in arrest of judgment. Petitioners' proposal to regard "determination of guilt" in terms of "entry of judgment" would have the effect of enlarging both "the period for taking any action under Rule * * * 34 [and] the period for taking an appeal," in express contravention of Rule 45(b).

2. *Petitioners' untimely motions in arrest of judgment did not toll the time for taking an appeal.*— When the trial court accepted the *nolo contendere* pleas constituting the "determination of guilt" within the meaning of Rule 34, petitioners had five days within which to move in arrest of judgment. Since they failed to do so, the motions which petitioners filed three months later, after the formal judgments had been entered, were untimely and without any validity as motions "in arrest of judgment" for the tolling purposes of Rule 37(a)(2). This conclusion is in accord with the views expressed by the Courts of

Appeals for the Third, Fifth, and Ninth Circuits. *United States* v. *Bertone*, 249 F. 2d 156, 158–159 (C.A. 3); *O'Neal* v. *United States*, 264 F. 2d 809 (C.A. 5); *Marion* v. *United States*, 171 F. 2d 185 (C.A. 9), certiorari denied, 337 U.S. 944; *Pugh* v. *United States*, 197 F. 2d 509, 511 (C.A. 9). While those cases dealt with the timeliness of appeals under Rule 37(a)(2) where untimely motions for new trial had been filed under Rule 33 (Appendix, *infra*, p. 47)—except for *Marion*, which also involved a motion under Rule 34—the precedents are applicable here.[4] For Rule 33 requires that a motion for a new trial be made within five days of "verdict or finding of guilty," a phrase which has the same meaning, the Advisory Committee Notes show (see *supra*, pp. 12–13), as "determination of guilt" in Rule 34. And Rule 37(a)(2) allows appeal within ten days after entry of an order denying a motion for a new trial, just as after denial of a motion in arrest of judgment. Only the Tenth Circuit has held that the time for taking an appeal under Rule 37(a)(2) may be extended by the filing of an untimely motion for a new trial. *Lujan* v. *United States*, 204 F. 2d 171; *Smith* v. *United States*, 273 F. 2d 462. In *Smith* the court conceded that the decisions of the other courts of appeals "tend to harmonize the two rules and that *Lujan* creates an anomalous situation" which "stands alone among the

[4] The court below treated Rules 33 and 34 as identical for the purpose of determining whether untimely motions under either Rule extended the time for filing an appeal under Rule 37(a)(2). 280 F. 2d at 27.

decisions considering the question" (273 F. 2d at 465).[5]

Petitioners make Rule 37 the exclusive guide to the determination of the timeliness of the appeals. In their view, the fact that the motions in arrest were themselves invalid—because untimely filed under Rule 34—is irrelevant since they complied with the literal requirement of Rule 37(a)(2). This would mean that Rule 37 has in effect rendered the five-day limits of Rules 33 and 34 without any meaning at all. As the Ninth Circuit held in *Pugh, supra,* 197 F. 2d at 511, if petitioners' contention "were the law, in every case the 5 days for such a motion for a new trial would run from the entry of the judgment and the beginning of the running of time from the making of the finding of guilt provided in Rule 33 would be an absurd

[5] Petitioners argue (Pet. Br. 21) that both the Tenth Circuit and this Court assumed jurisdiction in *Sullivan* v. *United States*, 212 F. 2d 125, affirmed, 348 U.S. 170, and that that case presented "facts identical in all material respects to those in the instant case." But the jurisdictional question was not brought to the attention of either the Tenth Circuit (since *Sullivan* was decided in that circuit after *Lujan*, jurisdiction would undoubtedly have been upheld) or this Court by the briefs of either party and neither court mentioned in its opinion that any question of jurisdiction was involved. While this Court could undoubtedly have noticed the lack of jurisdiction *sua sponte*, the fact that this question was overlooked hardly makes *Sullivan* a weighty precedent in support of petitioners' position. Perhaps the reason that this issue was overlooked is that the appeal was also timely taken from an order denying a motion to withdraw the plea of *nolo contendere* on the ground the the prosecutor had made false promises of leniency in exchange for the plea. See Rule 32(d) (Appendix, *infra*, pp. 46–47).

superfluity." Similarly, in *Bertone, supra,* 249 F. 2d at 159, the Third Circuit said that:

> * * * [I]f the defendant is right any motion for a new trial which is filed within 10 days after entry of judgment is timely and must be considered and granted or denied on its merits. This, however, would have the effect of writing out of Rule 33 the specific limitation that a motion for a new trial based on grounds other than newly discovered evidence "shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period." We cannot agree to a construction of Rule 37(a)(2) which would thus eliminate the 5-day limitation of Rule 33 and substitute a period which would always be at least 10 days and could be much longer than that. For example, in the present case a motion for a new trial filed within 31 days after verdict would have been timely, in the defendant's view.

In the instant case, by petitioners' contention, motions in arrest of judgment are timely even though filed three months after determination of their guilt.

In contrast, the position advanced by the government and adopted by the Third, Fifth, and Ninth Circuits harmonizes the provisions of Rules 33 and 34, on the one hand, and Rule 37, on the other. As the Third Circuit held in *Bertone, supra,* 249 F. 2d at 158:

> We think that the construction which the Government asks us to place upon Rule 37(a)(2) is the right one since it harmonizes

> the provisions of Rules 33 and 37(a)(2), giving full effect to each, and thus carries out what must have been the intent of the Supreme Court in promulgating both rules at the same time.

Rules 33 and 34 are given full effect, according to the government's construction, by limiting the time for motions for a new trial and arrest of judgment to the five-day period after conviction. The provision in Rule 37(a)(2) allowing an appeal within ten days after the denial of a motion for a new trial or in arrest of judgment, made within the ten-day appeal period after judgment, operates in at least three situations. First, the district court may impose sentence at the same time as conviction or before the five-day period for filing motions after conviction has run. See, *e.g.*, *Pugh* v. *United States*, *supra*. The defendant may then make valid motions under Rules 33 and 34 after sentence. Second, the district court may reserve decision on defendant's motions, made before sentence, until after sentence.[6] Third, the district court may grant an application of the defendant, timely made within the five-day period as provided by Rules 33 and 34, to extend the time for filing his motion for a new trial or in arrest of judgment. The sentence may be imposed before actual filing of

[6] By the literal words of Rule 37(a)(2), the ten-day period for appeal runs from the denial of the motion if the motion is filed within the ten days *after judgment*. We have no difficulty, however, in construing Rule 37 to allow an appeal within ten days after denial of the motion even though the motion is filed before sentence, and decision is reserved by the district court.

the motion for new trial or in arrest, and the motion itself may be filed within ten days of sentence. In all three instances, Rule 37(a)(2) provides that the time for appeal runs from the time the motion is denied, rather than from the time of sentencing.[1]

We submit that the position of the Third, Fifth, and Ninth Circuits is not only supported by the language and structure of the Rules, but is also the more reasonable approach. If defendants were permitted to delay filing a motion in arrest of judgment until after sentence—and then could delay filing notices of appeal until ten days after their motions were denied—this would substantially lengthen the time required to dispose of criminal cases. There is no reason for such delay since Rule 34 provides for motions in arrest of judgment only to challenge the jurisdiction of the court and the indictment—both issues which are apparent long before determination of guilt. But even if it is assumed, *arguendo,* that petitioners have advanced "powerful * * * arguments" for "greater flexibility with respect to the time for the taking of an appeal," this Court has

[1] Petitioner claims (Pet. Br. 16) that elimination of the word "seasonably," which was in an earlier draft of Rule 37(a)(2), from the final text indicates an intent to eliminate the requirement that a motion in arrest of judgment be timely filed under Rule 34. But the Advisory Committee Notes suggest no such intent to change prior procedure so substantially; rather, they simply state that the first sentence of Rule 37(a)(2)—which is the only relevant sentence here—"enlarges the time for taking an appeal from 5 days to 10 days." It appears, therefore, that "seasonably" was omitted because it was considered surplusage, in view of the existence of Rules 33 and 34.

found that the Rules "almost conclusively * * * show a deliberate intention to eliminate any power of the courts to extend the time for the taking of an appeal" and has therefore held that such policy questions "must be resolved through the rule-making process and not by judicial decision." *United States v. Robinson, supra* 361 U.S. at 228–229; see Rule 45(b).

B. THE COURT OF APPEALS HAD NO JURISDICTION EVEN IF PETITIONERS' MOTIONS IN ARREST OF JUDGMENT ARE CONSIDERED AS MOTIONS UNDER RULE 12(b) OR 28 U.S.C. 2255

As we have shown above (pp. 9–19), petitioners' time for appeal ran from the date of their sentence, not from the denial of their untimely motions in arrest of judgment, and therefore their notices of appeal were filed too late to confer jurisdiction on the court of appeals. Petitioners argue that, if that is so, their motions in arrest of judgment should be treated as motions under Rule 12(b) or 28 U.S.C. 2255. Their appeals, they claim, were filed within ten days of entry of the order denying these motions, as provided in Rule 37(a)(2).

1. *Rule 12(b).*—(a) Rule 12(b) (Appendix, *infra*, p. 46) provides that all defenses and objections "based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. * * * Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the

proceeding." However, petitioners' motions in arrest of judgment, made after conviction and sentence, were not filed "during the pendency of the proceeding."

The history of Rule 12(b) demonstrates that "during the pendency of the proceeding" refers to the period up to the time of conviction. Rule 12 was prescribed by this Court pursuant to the Act of June 29, 1940, c. 445, 54 Stat. 688. See 327 U.S. 821, 842–843. That Act authorized this Court to prescribe "rules of pleading, practice, and procedure with respect to any or all proceedings *prior to and including verdict, or finding of guilty* or not guilty by the court if a jury has been waived, *or plea of guilty,* in criminal cases in district courts of the United States * * *." 54 Stat. at 688 (emphasis added). The procedures after verdict, *i.e.,* after determination of guilt (see *supra,* pp. 10–13), are governed by Chapters VII and VIII of the Rules, entitled, respectively, "Judgment" and "Appeal." These Chapters, which include Rule 34, were promulgated under authority of the so-called Criminal Appeals Rules Act of 1933 which authorized this Court to prescribe "rules of practice and procedure with respect to any or all proceedings *after verdict, or finding of guilt* by the court if a jury has been waived, *or plea of guilty,* in criminal cases in district courts * * *." Act of February 24, 1933, c. 119, 47 Stat. 904, as amended, 18 U.S.C. (1946 ed.) 688 (emphasis added); see 327 U.S. 821, 856. Since Rule 12 can apply only *before* determination of guilt, the phrase "at any time during the pendency of the proceeding" in Rule 12 can refer only to the "proceedings

prior to and including verdict, or finding of guilty * * *."

Moreover, if Rule 12(b) allowed motions attacking the indictment or the jurisdiction of the court after conviction, the provision in Rule 34 for motions in arrest of judgment would be practically superfluous. That Rule allows a motion in arrest of judgment within five days after determination of guilt "if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged." Since the language of Rules 12 and 34 is virtually identical, it appears that Rule 12 (insofar as it relates to motions made after the pre-trial stage) and Rule 34 provide for motions having the same scope—that is, presenting allegations that the trial court lacks jurisdiction or the indictment fails to allege an offense. Thus, if petitioners' argument that a Rule 12(b) motion can be made after determination of guilt is accepted, any motion which could be made under Rule 34 only during the five days after conviction could instead be made during or after that period under Rule 12(b).

The only difference in the motions made under Rules 12 and 34 would be that, by the terms of Rule 37(a)(2), a defendant who has filed a timely motion in arrest of judgment does not have to file a notice of appeal on any aspect of the case until ten days after the motion is denied. In contrast, Rule 37 makes no provision for delaying the filing of a notice of appeal because a Rule 12(b) motion has been made, whether or not timely. Thus, by the terms of Rule 37(a)(2),

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the issues involved in the Rule 12(b) motion could be appealed by filing a notice of appeal within ten days of denial of that motion, but the issues not involved in the Rule 12(b) motion could be considered on appeal only if a notice of appeal from the conviction itself was filed within ten days of sentence.

This distinction between Rules 12 and 34 seems much too slight, however, to be the real basis for the formulation and adoption of Rule 34 specially providing for motions in arrest of judgment. There is nothing in the Advisory Committee Notes, nor anywhere else, suggesting that the sole purpose of Rule 34 was merely to allow defendants to delay their appeal on the entire case when motions attacking the indictment or the jurisdiction of the court were made within five days of conviction. Rather, the history of the Rule conclusively supports the more reasonable assumption that Rule 34 was intended to allow motions in arrest of judgment to attack the indictment or jurisdiction of the court *after conviction,* since Rule 12(b) did not provide for such motions.

Even if we are wrong and Rule 12 motions may be made after conviction, we submit that such motions cannot be made after sentence and final judgment. Once a judgment has become final, "the pendency of the proceeding" has ended.[8]

[8] The three lower-court cases relied on by petitioners (Pet. Br. 22) are admittedly inconsistent with the government's position. *Finn* v. *United States*, 256 F. 2d 304, 306 (C.A. 4), and *United States* v. *Holmes*, 110 F. Supp. 233, 234 (S.D. Tex.), concern motions in arrest of judgment made after conviction but before sentence, which were considered as Rule 12

(b) If, contrary to our contention, petitioners' appeal may be considered as taken under Rule 37(a)(2) from a denial of valid Rule 12(b) motions, a partial answer to petitioners' argument is that under Rule 37(a)(2) a valid Rule 12(b) motion, unlike a timely Rule 34 motion, does not toll the ten-day period during which an appeal from the sentence itself must be filed. The only issues before the court of appeals and this Court would be those questions which may be raised by a Rule 12(b) motion made after the pre-trial stage is over—whether the trial court had jurisdiction and whether the indictment charged an offense. As we will show below (pp. 34–35, 38), two of petitioners' contentions—whether the trial court sentenced petitioners on the basis of evidence adduced at another trial and whether the trial court's characterization of petitioners' offenses in the written judgment transmuted the felonies charged into misdemeanors—do not go to the jurisdiction of the trial court even though petitioners phrase them in jurisdictional terms. Thus, these two issues are not before this Court even if petitioners' motions are considered as validly made under Rule 12(b).

2. *28 U.S.C. 2255.*—(a) If petitioners' motions in arrest of judgment are considered as motions under 28 U.S.C. 2255 (Appendix, *infra*, pp. 44–45), the motions

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motions. In *Hotch* v. *United States*, 208 F. 2d 244, 250 (C.A. 9), the court of appeals relied on Rule 12 to consider an issue raised for the first time in that court. None of these cases, however, considers the history of Rule 12(b) or the superfluity of Rule 34 if Rule 12 motions may be made after conviction.

were nevertheless invalid. For 28 U.S.C. 2255, both in terms and as construed by this Court (*Heflin* v. *United States,* 358 U.S. 415, 418, 420–422), is available only to a person who is "in custody." Here petitioners were not in custody at the time they originally made the motions or at any subsequent time.

Petitioners, however, contend (Pet. Br. 24–25) they were at the time of their motions and still are in constructive custody since, if their appeals were untimely, they are not entitled to bail (citing *Black* v. *United States,* 269 F. 2d 38, 41 (C.A. 9), certiorari denied, 361 U.S. 938). But the fact remains that they are not in custody and therefore, as both Congress and this Court have decided, they are not entitled to the remedy provided in 28 U.S.C. 2255. Moreover, as the court of appeals noted (R. 115), they were not even in constructive custody at the time their motions in arrest of judgment were filed since the time for appeal from conviction and sentence had not run. While petitioners can bring an action under 28 U.S.C. 2255 as soon as they are committed to custody, there is no greater "circuity of actions" (Pet. Br. 25) than in any other situation where persons prematurely attempt to attack their conviction collaterally.

(b) Assuming, *arguendo,* that petitioners are correct and the instant case can be considered as a valid motion under 28 U.S.C. 2255, then, of course, the ordinary standards for collateral attack must be applied. As we will show below (*infra,* p. 26), petitioners' attack on the form of the indictment is not cognizable on collateral attack.

II

PETITIONERS' CONTENTIONS ARE WITHOUT SUBSTANCE ON THEIR MERITS

We have contended above (pp. 9–24) that the court of appeals was without jurisdiction of the instant case. Petitioners, however, contend that the court below and this Court have jurisdiction, either on direct appeal or by considering petitioners' motions in arrest of judgment as motions under Rule 12(b) or 28 U.S.C. 2255. In this Point, we respond to petitioners' claims on the merits. As to each of petitioners' substantive contentions, we will first discuss—assuming, *arguendo,* that this case involves an appeal from denial of valid motions made under Rule 12 (b) or 28 U.S.C. 2255—whether these contentions are properly within either Rule 12(b) or 28 U.S.C. 2255. We will then show that, even if this case were properly here on direct appeal, each of petitioners' substantive contentions is plainly without substance.

A. THE INDICTMENT AND BILL OF PARTICULARS SUFFICIENTLY APPRISED PETITIONERS OF THE NATURE OF THE OFFENSES CHARGED

Petitioners contend (Pet. Br. 25–38) that both the substantive and conspiracy counts are fatally defective in their failure to charge the essential elements of the offenses, and in their lack of specificity. More particularly, petitioners contend that the indictment (1) failed to allege any tax deficiency since it did not state how much tax the corporation paid during the year (Pet. Br. 28–31); (2) failed to allege petitioners'

knowledge of the existence of any tax deficiency (Pet. Br. 31–32); (3) failed to allege that petitioners filed the returns in question (Pet. Br. 37); (4) failed to particularize the role each petitioner played in the perpetration of the substantive and conspiracy offenses (Pet. Br. 38); and (5) failed to charge in the conspiracy count the basic elements of the substantive offense (Pet. Br. 33–34).

These contentions, even if correct, clearly are not sufficient to come within Rule 12 (as to motions made after the pre-trial stage) or 28 U.S.C. 2255. Rule 12(b), like Rule 34, provides by its specific terms only for motions which attack the jurisdiction of the trial court or which claim that the indictment has failed to charge an offense. Similarly, 28 U.S.C. 2255 provides for motions attacking jurisdiction of the trial courts or claiming that the indictment shows on its face that no offense could have been committed. *E.g.*, *Goto* v. *Lane*, 265 U.S. 393; *Marteney* v. *United States*, 216 F. 2d 760, 762 (C.A. 10). Here, it is clear that the indictment charged federal offenses; petitioners claim only that the indictment should have been more specific in order to apprise them of the precise offenses charged.

In any event, considering petitioners' contentions as if this Court had jurisdiction of their direct appeal, they are clearly without merit. Section 145 of the Internal Revenue Code of 1939 and Section 7201 of the Internal Revenue Code of 1954 (Appendix, *infra*, pp. 43–44) punish "any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter [title] or the payment

thereof * * *." The substantive counts (R. 1–6), with appropriate variations as to dates and amounts, alleged that petitioners were officers and employees of Farnsworth & Chambers Company, Inc., that they and their co-defendants "did wilfully and knowingly attempt to evade and defeat a large part of the taxes due and owing" by the corporation for each of the years involved, and that the attempted evasion was effected in the following manner: by (1) falsifying and altering corporate invoices, books and records; (2) concealing corporate assets; (3) diverting corporate net income; (4) concealing corporate income; and (5) preparing and mailing a false and fraudulent corporate income tax return. In addition, the substantive counts alleged that the return filed for each year reported that the corporation had earned a specifically designated amount of net income upon which it owed a specifically designated amount of tax, "whereas, as * * * [petitioners] then and there well knew the net income of the corporation" was a substantially greater amount (which was specifically designated), "upon which said net income the corporation owed * * * a total tax" of a specifically designated amount. The conspiracy count (R. 6–10) alleged that petitioners and their co-defendants engaged in a continuing conspiracy, from about January 1, 1950, to the date of the return of the indictment March 14, 1955, "to violate Section 145(b) of the Internal Revenue Code of 1939 * * * and Section 7201 of the Internal Revenue Code of 1954 * * *" by attempting "to evade and defeat a large part of the income taxes due and owing * * * by [the corporation]

for the calendar years of 1951, 1952, 1953, and 1954"; that it was part of the conspiracy to falsify books and records, to approve false invoices, to conceal purchases of corporate assets by representing that payments for "such assets were for rentals, repair expenses, parts expenses and materials used in construction work * * *," and to alter "the true records of the corporation for the purpose of concealing [its] true net income"; and, finally, that twenty-six specifically described overt acts (R. 8–10) were committed "in furtherance of the object, design and purpose of such conspiracy."

The United States voluntarily furnished a bill of particulars (R. 11–13) specifying that proof of unreported net income would be on the "specific items" basis and that the evasion of taxes for the years in question resulted in part from the following: (1) "the omission of income * * * from * * * construction and related activities, including but not limited to building roads, grading ditches, building driveways, building a swimming pool, clearing timber and/or the sale of same—all in the approximate amount of $71,136.00 * * *"; (2) "the over statement of construction costs and expenses * * * by allocation of personal expenditures of all defendants and other corporate executives * * * to corporate construction costs and expenses, in the approximate amount of $324,877.00 * * *"; (3) "the concealment of assets acquisitions, by showing them on their books and records as construction costs and expenses * * *"; (4) the deduction "as construction costs and expenses * * * of expenditures * * * for other corporations in the approximate amount of $525,643.00"; and (5) "the

acquisition of corporate assets * * * under the subterfuge of paying corporate expenses and construction costs." The trial court denied petitioners' motion for a supplemental bill of particulars (R. 13–15).

Manifestly, the indictment charged the substantive and conspiracy offenses in the language of the evasion statutes (Section 145(b) of the 1939 Code and Section 7201 of the 1954 Code) and of the conspiracy statute (18 U.S.C. 371, Appendix, *infra*, p. 44). Accordingly, on its face it sufficiently charged the offenses to which petitioners pleaded (*United States* v. *Lepowitch*, 318 U.S. 702, 704; *Ekberg* v. *United States*, 167 F. 2d 380, 387 (C.A. 1)), with further details to be provided, in the court's discretion, through a bill of particulars. The evasion counts of the indictment not only charged all of the essential elements of the offenses but did so in detail exceeding that of indictments approved repeatedly, over a long period of time, by numerous lower federal courts.[9] Although the indictment need not allege the manner of attempted evasion (*Reynolds* v. *United States*, 225 F. 2d 123, 126 (C.A. 5); *Heasley* v. *United States*, 218 F. 2d 86, 88–89 (C.A. 8), certio-

[9] *Rick* v. *United States*, 161 F. 2d 897, 898–899 (C.A. D.C.); *Gaunt* v. *United States*, 184 F. 2d 284, 288 (C.A. 1); *Reynolds* v. *United States*, 225 F. 2d 123, 126 (C.A. 5); *Guzik* v. *United States*, 54 F. 2d 618, 619 (C.A. 7), certiorari denied, 285 U.S. 545; *United States* v. *Rosenblum*, 176 F. 2d 321, 329–330 (C.A. 7); *Cave* v. *United States*, 159 F. 2d 464, 466–467 (C.A. 8); *Remmer* v. *United States*, 205 F. 2d 277, 281 (C.A. 9); *Legatos* v. *United States*, 222 F. 2d 678, 681 (C.A. 9); *Samish* v. *United States*, 223 F. 2d 358, 366 (C.A. 9); *United States* v. *American Stevedores*, 16 F.R.D. 164, 168–169 (S.D. N.Y.); *United States* v. *Carpenter*, 175 F. Supp. 362, 364 (N.D. Ga.); *United States* v. *Trownsell*, 117 F. Supp. 24, 25 (N.D. Ill.); *United States* v.

rari denied, 350 U.S. 882; *United States* v. *Rosenblum*, 176 F. 2d 321, 324 (C.A. 7)), this indictment set forth, specifically, a multiplicity of means. There is no basis in the statutes, in decisional law, or in reason for petitioners' assertion (Pet. Br. 35–37) that an indictment charging the attempted evasion of corporate taxes requires greater specificity than one charging the attempted evasion of individual income taxes.[10] Clearly, the detailed allegations in the first four substantive counts of the indictment—as did the equally detailed allegations in the fifth count of the steps taken to consummate the conspiracy—constituted "plain, concise and definite" statements of the respective offenses (Rule 7(c)) which together with the bill of particulars fully apprised petitioners of the nature of the charges to which they were called upon to respond.

Petitioners' specific allegations are also clearly without merit:

(1) They claim (Pet. Br. 28–31) that the indictment was invalid because it failed to state how much tax the

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Bahcall, 116 F. Supp. 869 (N.D. Ill.); cf. *Mangiaracina* v. *United States*, 10 F.R.D. 415, 416 (W.D. Mo.).

Such indictments, with considerably less detail than those here, have also been involved in several cases before this Court. *United States* v. *Beacon Brass Co.*, 344 U.S. 43, 44–45; *Holland* v. *United States*, 348 U.S. 121, 125; cf. *Achilli* v. *United States*, 353 U.S. 373; *Troy* v. *United States*, 293 U.S. 58.

[10]Petitioners state as the primary basis for the distinction between individual and corporate taxes (Pet. Br. 35) that "[n]o corporate officer or employee is necessarily in a position to know what the income of the corporation is * * *." Here, however, the indictment specifically charged that petitioners did know the correct income of the corporation (R. 1–6).

corporation paid for each tax year. The gist of the offense defined by Sections 145(b) and 7201 is the wilful *attempt* to evade and defeat the tax (Congress has not made evasion, *per se*, an offense). The offense is complete when, with the requisite wilfulness, a false and fraudulent return has been filed, understating net income and tax liability—the situation described in considerable detail in the first four counts of the indictment here. The amount of tax paid is immaterial except insofar as it relates to the proof at trial of the deficiency alleged in the indictment. See *Lawn* v. *United States*, 355 U.S. 339, 360–361. In other words, the amount of payment is relevant to the question of the sufficiency of the evidence to sustain conviction, not to the validity of the indictment.

(2) Petitioners contend (Pet. Br. 31–32) that the indictment failed to allege that they had knowledge of the existence of any tax deficiency. The indictment, however, alleged that petitioners "did wilfully and knowingly attempt to evade and defeat" the tax, that they prepared or caused to be prepared a false and fraudulent corporate return, and that the return understated the net income of the corporation which "they then and there well knew" was a higher amount (R. 1–6). These allegations charge that petitioners had knowledge that tax returns were being filed understating corporate income and the tax due. Here, also, greater specificity is not required in the indictment but is a matter of proof at trial.

(3) The assertion (Pet. Br. 37) that the indictment failed to allege that petitioners *filed* the tax returns—even assuming, *arguendo*, that such an allegation was

required—is frivolous. Each count alleged that petitioners "did wilfully and knowingly attempt to evade and defeat a large part" of the corporation's tax by, *inter alia,* "preparing and causing to be prepared, and mailing and causing to be mailed at Houston, Texas, a false and fraudulent" return on behalf of the corporation "which was filed * * * with the Collector of Internal Revenue * * *" (R. 1–6). Thus, each count in effect alleged that petitioners filed the returns. In any event, a similar indictment has been upheld on the ground that an allegation of mailing even without an allegation of filing is sufficient. *United States* v. *Albanese,* 224 F. 2d 879, 881–882 (C.A. 2), affirming 117 F. Supp. 736, 737 (S.D. N.Y.), certiorari denied, 350 U.S. 845.

(4) The complaint (Pet. Br. 38) that the indictment "in no way distinguishes the accusations against any one individual from the accusations against the others" ignores the effect of 18 U.S.C. 2, which provides that aiders and abettors are punishable as principals. An indictment need not specify whether a particular defendant is a principal or an accessory. *Jin Fuey Moy* v. *United States,* 254 U.S. 189; *Greenberg* v. *United States,* 297 Fed. 45 (C.A. 8); *O'Brien* v. *United States,* 25 F. 2d 90 (C.A. 7); *Swanne Soon Young Pang* v. *United States,* 209 F. 2d 245 (C.A. 9). Moreover, since omission of the means of attempted evasion is not fatal to an indictment (*supra,* pp. 29–30), the failure to specify which of a number of defendants committed particular acts constituting the means is, *a fortiori,* not fatal. In short, here again, the pre-

cision petitioners seek concerning the specific part played by each defendant is a matter for proof at trial.

(5) Lastly, petitioners contend (Pet. Br. 33–34) that the conspiracy count failed to allege all the basic elements of the substantive offense, particularly the existence of the tax deficiency and petitioners' knowledge of the deficiency. But "it is not necessary to allege with technical precision all the elements essential to the commission of the offense which is the object of the conspiracy, *Williamson* v. *United States*, 207 U.S. 425, 447, or to state such object with the detail which would be required in an indictment for committing the substantive offense * * *. In charging such a conspiracy 'certainty to a common intent, sufficient to identify the offense which the defendants conspired to commit, is all that is necessary.' *Williamson* v. *United States, supra* * * *." *Wong Tai* v. *United States*, 273 U.S. 77, 81.

The conspiracy count here did far more than merely identify the offense which petitioners conspired to commit. It not only alleged that petitioners engaged in a continuing conspiracy "to violate Section 145(b) of the Internal Revenue Code of 1939 * * * and Section 7201 of the Internal Revenue Code of 1954 * * *," but went on to charge in substantially the same language as these two sections that the purpose of the conspiracy was "[t]o wilfully attempt to evade and defeat a large part of the income taxes due and owing" by the corporation (R. 6–7). The count then specified various means used to effectuate the conspiracy, such as the falsification of books and

records, the approval of false invoices, and alteration of the records of the corporation to conceal its net income (R. 7).

While *Wong Tai* holds that elements of the substantive crime need not be alleged in the indictment, the conspiracy count here alleges all the elements of the substantive offenses. As we have shown above with regard to the substantive offenses (p. 31), the allegations in the conspiracy count, while general, charge the existence of a tax deficiency and the knowledge of it by petitioners. With regard to the conspiracy count even more than as to the substantive allegations, further specification of these elements of the offense is a matter of proof at the trial.

B. THE TRIAL COURT CONVICTED AND SENTENCED PETITIONERS UPON THEIR PLEAS OF *NOLO CONTENDERE*

Petitioners contend (Pet. Br. 39–53) that they were convicted and sentenced on the testimony adduced at the trial of their co-defendants and that therefore the trial court lost jurisdiction to convict and sentence them. If the court below and this Court have jurisdiction only by treating petitioners' motions as made under Rule 12(b) (but see *supra*, pp. 19–22), petitioners' contention is clearly not before the Court. For, although petitioners have phrased this contention in terms of jurisdiction, the actual issue concerns the evidence on which petitioners were sentenced and convicted. If they were sentenced on evidence adduced at the trial of their co-defendants,

they may have been deprived of their rights under the Sixth Amendment, but the district court nevertheless had jurisdiction. Jurisdiction is not lost merely because a court acts erroneously or even unconstitutionally. On the other hand, if petitioners' motion in arrest of judgment could properly be treated as a motion under 28 U.S.C. 2255 (but see *supra,* pp. 23–24), the issue is properly before the Court. That statute allows not only motions challenging the jurisdiction of the trial court but also motions contending "that the sentence was imposed in violation of the Constitution * * *."

Assuming, *arguendo,* that this issue is properly here, it is directly contrary to the facts as shown by the record. The court of appeals succinctly pointed out what occurred during the proceedings for sentencing on June 19, 1959 (R. 112–113): "the court heard statements of [petitioners'] counsel * * * seeking mitigation of punishment"; there were frequent references in these statements "to matters which transpired at the trial of the other defendants", petitioners' counsel having "had a representative at the trial, taking notes, and reporting * * * so that they knew * * * 'exactly what was testified, in substance' "; two of the three petitioners made statements on their own behalf; and seventeen character witnesses testified. At the conclusion of the hearing, the district court stated, "I have found each guilty of the felonies as contained in the grand jury indictment", and imposed the sentences (R. 60). On June 22, 1959, the

court entered formal judgments and commitments (following Form 25 of the Appendix of Forms to the Federal Rules of Criminal Procedure), which, as to each petitioner, stated, "It is Adjudged that the defendant has been convicted upon his plea of nolo contendere * * *" (R. 61, 63, 65).

In short, while the court occasionally referred to the trial of petitioners' co-defendants, the large majority of the references were by petitioners' counsel to which the court replied (see, *e.g.*, R. 47–48, 53, 55). Although petitioners now claim (Pet. Br. 52) that the evidence adduced at the other trial cannot even be considered for purposes of sentencing, at the sentencing proceeding they obviously believed and acted on the principle that the evidence was relevant for purposes of sentencing. See *United States* v. *Norris,* 281 U.S. 619, 622–623. There is nothing in the record to suggest that the trial court improperly used this evidence to determine petitioners' guilt, particularly since the pleas of *nolo contendere,* which had been accepted by the court, fully determined their guilt. And the judgments, shown by the record to be based on petitioners' own pleas, are entitled to the presumption of regularity that attaches to a judgment of conviction following entry of a guilty plea. See *Davis* v. *United States,* 226 F. 2d 834, 836 (C.A. 8).

Moreover, despite the court's few references to the other trial, petitioners made no motion to withdraw their pleas under Rule 32(d) before sentence was imposed. They cannot, having relied throughout on

the advantages of *nolo contendere* pleas,[11] seek to withdraw them when they found that their sentences were more than they expected. Cf. *Johnson* v. *United States*, 318 U.S. 200–201.[12]

C. THE DESCRIPTION OF THE OFFENSES IN THE WRITTEN JUDGMENTS ENTERED BY THE TRIAL COURT, CORRECTIBLE UNDER RULE 36 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE, CANNOT TRANSMUTE THE FELONIES CHARGED IN THE INDICTMENTS INTO MISDEMEANORS

Petitioners finally contend (Pet. Br. 53–55) that, since the written judgments stated that they were guilty of misdemeanors, imposition of the sentences

[11] As one of petitioners' principal counsel stated at the hearing on sentence, "there are wonderful advantages to [a plea of *nolo contendere*]. If I were doing it today I would do just exactly that, I would advise these clients of ours to do precisely what they did * * *. They are standing by it and so am I" (R. 46).

[12] Nor is there any merit in petitioners' complaint (Pet. Br. 39, 51–52) that there was unreasonable delay in imposing the sentences three months after their pleas. It is not unusual, in a case involving a number of defendants, for some to enter pleas of guilty or *nolo contendere* before trial, and to be sentenced after trial of the remaining defendants. And it is generally desirable to have the same judge sentence all participants in one offense or series of related offenses. *United States* v. *Bishop*, 76 F. Supp. 866 (D. Ore.). Petitioners did not request imposition of sentence prior to the conclusion of the trial of their co-defendants. Cf. *Kaye* v. *United States*, 235 F. 2d 187 (C.A. 6); *Caldwell* v. *United States*, 36 F. 2d 738 (C.A. 10), certiorari denied, 281 U.S. 725. The sentences were imposed in June 19, 1959 (R. 60–61), shortly after the trial of the co-defendants had been concluded on June 9 (Pet. Br. 5). See *Miller* v. *Aderhold*, 288 U.S. 206, 210–212, holding that delay in imposing sentence, regardless of the length of the delay, does not deprive the trial court of jurisdiction, at least where the defendant raises no objection.

for felonies was beyond the jurisdiction of the district court. Here also (cf. *supra,* pp. 34–35), although petitioners' argument is phrased in terms of jurisdiction, their actual claim is that the district court imposed an impermissibly long sentence. Since this issue does not concern the jurisdiction of the district court or the indictment, it is not cognizable under Rule 12(b). Therefore, the court of appeals and this Court are without jurisdiction of this issue even if we consider petitioners' motions in arrest of judgment as valid motions under Rule 12(b) (but see *supra,* pp. 19–22). If their motions are considered as valid under 28 U.S.C. 2255 (but see *supra,* pp. 23–24), this issue is cognizable by the court below and this Court since that statute provides for collateral attack based on the claim "that the sentence was in excess of the maximum authorized by law * * *" (see Appendix, *infra,* p. 44).

Assuming, *arguendo,* that this issue is properly before the Court on direct appeal, it is nevertheless without merit. The indictment returned against petitioners plainly charged felony offenses in violation of Section 145(b) of the Internal Revenue Code of 1939, Section 7201 of the Internal Revenue Code of 1954, and 18 U.S.C. 371 (R. 1–10). Petitioners unequivocally pleaded *nolo contendere* to felonies (R. 17–27, 30–39). The trial court, sentencing petitioners, found "each guilty of the felonies as contained in the Grand Jury indictment" (R. 60). The notices of appeal explicitly refer to the offenses to which petitioners entered pleas of *nolo contendere* as attempted evasion

of corporate taxes and conspiracy to commit the substantive offenses in violation of the above-mentioned felony statutes (R. 74, 81).

Petitioners rely on the trial court's characterization of the offenses in the written judgments as (1) "the offense of filing false and fraudulent corporate income tax returns" and (2) "conspiring to file false and fraudulent corporate income tax returns" (R. 61–62, 63, 65). Petitioners claim that this language describes offenses under Section 145(a) of the 1939 Code and Sections 7203 and 7207 of the 1954 Code,[13] which are misdemeanors. It is apparent that the trial court, by way of abbreviation, was attempting to describe the offense of attempted evasion by equating it with the alleged means of committing the offense.[14] (see R. 61–65). Moreover, the language relied upon by petitioners is immediately followed in the written judgments by the specific statement that petitioners violated the felony provisions covering wilfully attempted evasion—Section 145(b) of the 1939 Code and Section 7201 of the 1954 Code. The judgments make no specific reference to the misdemeanor provisions of either the 1939 or 1954 Code. And all of the petitioners were given sentences exceeding one year, sentences which were appropriate for conviction of felonies but not misdemeanors.

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[13] However, a comparison of the language in the judgments and Sections 145(a) of the 1939 Code and 7203 of the 1954 Code shows clearly that the judgments did not relate to those sections.

[14] This Court in *Sullivan* v. *United States*, *supra*, 348 U.S. at 170–171, similarly characterized a felony offense under Section 145(b) of the 1939 Code.

In the circumstances, it is clear that petitioners were convicted and sentenced for felonies. First, the oral, not the written, sentence governs if the two are in conflict. Only if the oral sentence is ambiguous can other materials, such as the written judgment, be used to ascertain the intent of the court at the time of sentence. Here the oral sentences were unambiguous.

Second, even if the oral sentences were ambiguous and the written judgments are considered as evidence of the sentencing court's intent, it is still clear that petitioners were convicted and sentenced for felonies. While the written judgments conceivably describe misdemeanor offenses, they specifically state that petitioners violated the felony provisions. If the written judgments are construed mostly favorably to petitioners, they are ambiguous and internally inconsistent. And considering all the circumstances, the general descriptions of the offenses in the written judgments are the only suggestion in the record that misdemeanors were involved. This evidence is surely not sufficient to overcome the overwhelming evidence to the contrary—that the intent of the district judge was to sentence petitioners for the felonies for which they were indicted.

The description of the offenses in the written judgments in terms of the misdemeanor offenses was ~~undoubtedly~~ nothing more than a clerical error. If petitioners want the written judgments to be corrected, they can call the error, if it is one, to the attention of the trial court by motion under Rule 36 (Appendix, *infra*, p. 47), which allows clerical errors in judgments

to be corrected by the sentencing court at any time. *Costello* v. *United States*, 252 F. 2d 750, 751 (C.A. 5); *Tseung Chu* v. *Cornell*, 247 F. 2d 929, 932 (C.A. 9); *Ex parte Sherwood*, 177 F. Supp. 411, 413 (D. Ore.), certiorari denied, 363 U.S. 851.

If petitioners' motions in arrest of judgment are considered as valid motions under 28 U.S.C. 2255 (but see *supra*, pp. 23–24), the written judgments may be entitled to greater weight. In our brief in *Payne* v. *Madigan*, No. 180, this Term, and *Young* v. *United States*, No. 184, this Term (pp. 27–28), we have argued that in a habeas corpus proceeding the accuracy of written judgments cannot be impeached. This argument results in large part from the inappropriateness of allowing courts other than the sentencing court to look beneath the written judgment. Therefore, this argument probably would not apply to a motion under 28 U.S.C. 2255 in the sentencing court. If, however, the written judgments are considered as binding here, they are at most ambiguous. Construing the judgments most favorably to petitioners, one portion indicates that petitioners ~~were~~ were sentenced for misdemeanors, while other portions indicate that the court was sentencing petitioners for felonies. In this situation, petitioners are not entitled to relief on the basis of the judgments alone; the ambiguity of the judgments can only be resolved by looking to the oral sentences. The oral sentences, as well as all the other indications from the proceedings, make clear that petitioners were convicted and sentenced for felonies.

CONCLUSION

We respectfully submit that the judgment below should be affirmed.

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APPENDIX

INTERNAL REVENUE CODE OF 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U.S.C. (1952 ed.) 145)

INTERNAL REVENUE CODE OF 1954:

SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned

not more than 5 years, or both, together with the costs of prosecution.

(26 U.S.C. 7201)

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18 U.S.C.:

SEC. 371. *Conspiracy to commit offense or to defraud United States.*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

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28 U.S.C.:

SEC. 2255 [as amended by Sec. 114, Act of May 24, 1949, c. 139, 63 Stat. 89]. *Federal custody; remedies on motion attacking sentence.*

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

FEDERAL RULES OF CRIMINAL PROCEDURE:

Rule 12. Pleadings and Motions before Trial; Defenses and Objections.

* * * * *

(b) *The Motion Raising Defenses and Objections.*

* * * * *

(2) *Defenses and Objections Which Must Be Raised.* Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

* * * * *

Rule 32. Sentence and Judgment.

(a) *Sentence.* Sentence shall be imposed without unreasonable delay. Pending sentence the court may commit the defendant or continue or alter the bail. Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment.

* * * * *

(d) *Withdrawal of Plea of Guilty.* A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the

court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

* * * * *

Rule 33. New Trial. The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period.

* * * * *

Rule 34. Arrest of Judgment. The court shall arrest judgment if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made within 5 days after determination of guilt or with such further time as the court may fix during the 5-day period.

Rule 36. Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders.

Rule 37 [as amended April 12, 1954]. *Taking Appeal; and Petition for Writ of Certiorari.*

(a) *Taking Appeal to a Court of Appeals.*

* * * * *

(2) *Time for Taking Appeal.* An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from,

but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant. An appeal by the government when authorized by statute may be taken within 30 days after entry of the judgment or order appealed from.

* * * * *

Rule 45. Time.

* * * * *

(b) *Enlargement.* When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion permit the act to be done after the expiration of the specified period if the failure to act was the result of excusable neglect; but the court may not enlarge the period for taking any action under Rules 33, 34 and 35, except as otherwise provided in those rules, or the period for taking an appeal.

CRIMINAL APPEALS RULES OF 1933:

I [as amended May 24, 1937]. *Sentence.*—After a plea of guilty, or a verdict of guilt by a jury or finding of guilt by the trial court where a jury is waived, and except as provided

in the Act of March 4, 1925, c. 521, 43 Stat. 1259, sentence shall be imposed without delay unless (1) a motion for the withdrawal of a plea of guilty, or in arrest of judgment or for a new trial, is pending, or the trial court is of opinion that there is reasonable ground for such a motion; or (2) the condition or character of the defendant, or other pertinent matters, should be investigated in the interest of justice before sentence is imposed. The judgment setting forth the sentence shall be signed by the judge who imposes the sentence and shall be entered by the clerk.

Pending sentence, the court may commit the defendant or continue or increase the amount of bail.

II. *Motions.* * * *

(2) Save as provided in subdivision (3) of this Rule, motions in arrest of judgment, or for a new trial, shall be made within three (3) days after verdict or finding of guilt.

* * * * *

III. *Appeals.* An appeal shall be taken within five (5) days after entry of judgment of conviction, except that where a motion for a new trial has been made within the time specified in subdivision (2) of Rule II, the appeal may be taken within five (5) days after entry of the order denying the motion.

Petitions for allowance of appeal, and citations, in cases governed by these rules are abolished.

Appeals shall be taken by filing with the clerk of the trial court a notice, in duplicate, stating that the defendant appeals from the judgment, and by serving a copy of the notice upon the United States Attorney. The notice of appeal shall set forth the title of the case, the names and addresses of the appellant and

appellant's attorney, a general statement of the nature of the offense, the date of the judgment, the sentence imposed, and, if the appellant is in custody, the prison where appellant is confined. The notice shall also contain a succinct statement of the grounds of appeal and shall follow substantially the form hereto annexed.

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